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May 24, 2010

LaDonna Castañuela
Texas Commission on Environmental Quality
Office of Chief Clerk, MC-105
Austin, Texas 78711-3087

via e-file

Re: SOAH Docket No. 582-09-2895; TCEQ Docket No. 2008-1305-MWD; In the
Matter of the Application of Farmersville Investors, L.P. for TPDES Permit No.
WQ0014778001.

To Ms. Castañuela:

Please find enclosed for electronic filing Protestants James A. and Shirley
Martin's Objection to ALJ's Recommendation to Re-open the Record and Motion for
Briefing Schedule. Protestants seek a ruling on their Motion in the event that the
Administrative Law Judge does not withdrawal her recommendation to re-open the
record and revise her PFD

If you have any questions, please do not hesitate to call.

Sincerely,


Richard W. Lowerre

Enclosures

cc: Service List
Les Trobman

**SOAH DOCKET NO. 582-09-2895
TCEQ DOCKET NO. 2008-1305-MWD**

**APPLICATION OF FARMERSVILLE
INVESTORS, L.P. FOR TPDES PERMIT
NO. WQ0014778001**

**§ BEFORE THE TEXAS COMMISSION
§ ON
§ ENVIRONMENTAL QUALITY
§**

**PROTESTANTS JAMES A. AND SHIRLEY MARTIN'S
OBJECTION TO ALJ'S RECOMMENDATION TO RE-OPEN THE RECORD
AND MOTION FOR BRIEFING SCHEDULE**

**TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY:**

Come now, Protestants James and Shirley Martin and files this their 1) objection to certain aspects of the proposals by the Administrative Law Judge (ALJ), including the proposal for the addition of new evidence into the record and 2) request for a briefing schedule to allow all parties to respond to the ALJ's letter and proposal for new evidence and, in support thereof, Protestants respectfully show the following:

INTRODUCTION

Protestants urge the ALJ to withdraw her proposal to open the record and to revise the Proposal for Decision (PFD). As indicated in the objections filed by OPIC, the Applicant has misled the ALJ, inadvertently or on purpose, on the deposition testimony of TCEQ staff witness, Mr. Michalk.

In the alternative, Protestants join in the objections filed by OPIC and join in OPIC's Motion to Strike the Applicant's attachment. Finally, should the Commission want some of the deposition, Protestants support OPIC's proposal that the entire deposition testimony be admitted into evidence and that the matter be remanded to allow Protestants and other parties to present their evidence, cross-examine the deponent, Mr. Michalk, and respond to any related evidence presented by others.

SUMMARY

The ALJ has recommended that the Commission re-open the record to admit the partial deposition testimony attached to Applicant's Response to Exceptions. Based on the new "evidence", she has also proposed to revise her PFD.

Objection: Protestants respectfully object to new evidence that the ALJ proposes to include in the record **unless** the matter is remanded and the hearing is re-opened to allow all parties to present their related evidence. Protestants have several concerns with evidence not in the record being considered at all. For example, the Applicant has attached selected sections of a deposition, when the witness in deposition actually states the opposite of what the Applicant suggests the deposition stands for. The ALJ apparently relied upon the arguments of Applicant, without having access to the entire deposition.

Motion: Protestants also move for time to prepare and present a response to the new proposals of the ALJ, including the new evidence and the proposed changes to the PFD.¹

DISCUSSION

On May 18, 2010, the ALJ filed a letter with the Commission with several new recommendations. Among these was a recommendation that the record be re-opened to admit an attachment to Applicant's Response to Exceptions. This attachment is a portion of deposition testimony of Mr. James Michalk. Protestants object to this recommendation for several reasons.

First, the attachment to Applicant's Response to Exceptions is not in evidence. It was never offered into evidence. It is not made part of the record by being part of a brief or exceptions.

¹ Protestants are aware that 30 Texas Administrative Code §80.259 prevents parties from filing exceptions or briefs in response to an amended PFD, but Protestants are required to respond to the ALJ's recommendation to reopen the record and any proposals based on evidence not in the record.

As the ALJ points out, no party objected to the attachments' inclusion in Applicant's Response to Exceptions. That does not, however, make the attachment evidence or even admissible. Protestants should be able to assume that an ALJ will not consider facts not in evidence. Protestants contend that the ALJ should have never even considered what was in the deposition.

Protestants are under no obligation to object to documents in pleadings that are not in the record unless the documents are explicitly offered as evidence. The ALJ and Commission are prohibited from relying upon documents that are not in the record, so objecting to a document that was not being offered is not required. Protestants did not need to and, thus, never did object to a document that Applicant never offered into evidence.

Protestants do, however object to the offer now made by the ALJ. Protestants object to the attachment being admitted into evidence because Protestants due process rights in this adjudicatory hearing require that Protestants be given the opportunity to present their related evidence on the matter. Protestants also object because the evidence is clearly misleading. Thus, Protestants have and will seek to offer additional evidence to counter the part of the deposition the ALJ proposes to admit into the record.

For example, on pages 64 through 66 of the deposition, TCEQ staff James Michalk states that his initial modeling is not adequate to be used to determine discharge limits for a discharge at the outfall, if the outfall is to the lake rather than an intermittent stream.² The original modeling was for the open waters of the lake, not the cove that is proposed for the outfall.

The deposition testimony attached to Applicant's Replies to Exception is only a portion of the entire testimony. Mr. Michalk's says the opposite of what the Applicant claimed and the ALJ assumed.

² See pages 64, line 11 to page 64, line 19 of Attachment 1 to OPIC's Motion to Strike.

There are additional reasons why all parties should be provided time to evaluate the ALJ's new proposals and have time to respond to them. The Commission has provided a similar process for Protestants' motion to include the final regional feasibility report in the record. Moreover, the changes the ALJ proposes for the PFD are significant changes that are based on a misunderstanding of the actual facts because of an effort by Applicant to mislead the ALJ.

CONCLUSION & PRAYER

WHEREFORE, PREMISES CONSIDERED, Protestants pray that the Commission provide the parties time to formally and fully respond to the new recommendations of the ALJ, including the recommendation to re-open the record and to change the PFD based on evidence not in the record, if the proposals by the ALJ for new evidence and revisions to the PFD are not withdrawn. Whether or not additional time is provided, the Commission should reject the motion to open the hearing for the new evidence and reject the new recommendations that are based on deposition testimony that is not in the record. Should the Commission remand the matter to allow the hearing to be re-opened on the issues raised by the ALJ, all parties should be allowed to supplement the record with appropriate evidence to assure a complete record is before the Commission.

Respectfully Submitted,

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By: 

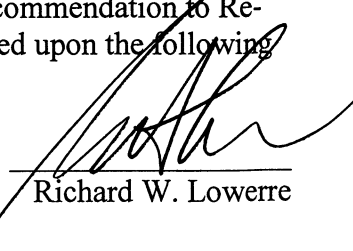
Richard W. Lowerre

State Bar No. 12632900

For Protestants James A. and Shirley Martin

CERTIFICATE OF SERVICE

By my signature, below, I certify that on the 24th day of May, 2010, a true and correct copy of Protestants James A. and Shirley Martin's Objection to ALJ's Recommendation to Re-open the Record and Motion for Briefing Schedule set out above was served upon the following in the methods described below.


Richard W. Lowerre

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